A

SATHUNAVAKEY

v.

ORIENTAL BANK BHD

B

COURT OF APPEAL, PUTRAJAYA
ABDUL KADIR SULAIMAN JCA
TENGKU BAHARUDIN SHAH JCA
AZMEL MAAMOR JCA
[CIVIL APPEAL NO: W-02-502-1998]

C

26 OCTOBER 2007

LAND LAW: *Charge - Order for sale - Appeal against - Affidavit in reply, affirmation of - Cause to the contrary - Whether there was failure to comply with mandatory requirements of O. 83 r. 3(3)(c) and (6) Rules of the High Court 1980*

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CIVIL PROCEDURE: *Affidavits - Affirmation - Whether appellant's affidavit in reply affirmed by appellant and not another person*

CIVIL PROCEDURE: *Affidavits - Affidavit in support of application - Whether there was non-compliance with mandatory requirements - Rules of the High Court 1980, O. 83 r. 3(3)(c), (6)*

E

This was an appeal against the decision of the learned High Court judge allowing the respondent chargee's application for an order for sale of the appellant's land under s. 256 of the National Land Code, to recover the sum of RM1,204,142.27 allegedly due and owing to the respondent as at 30 June 1997 in respect of loan facilities granted by the respondent to the appellant and to one Jothy's Restaurant for her benefit. The appellant had executed three legal charges over the said land as security, one for each of the three facilities. The following two issues were raised on behalf of the appellant in this appeal: (i) that the learned judge, on the respondent's preliminary objection, rejected the appellant's affidavit in reply ('encl. 8') since it was affirmed not by the appellant but by one Sivajothy Nagalingam; (ii) that there was cause to the contrary in that the respondent failed to comply with the mandatory requirements of O. 83 r. 3(3)(c) of the Rules of the High Court 1980 ('RHC'). The respondent's originating summons was issued on 2 October 1997 but in the supporting affidavit dated 1 October 1997, the overdue interest and the amount due and owing in the respective charges was calculated only up to 30

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June 1997. The subsequent supplementary affidavits merely updated the overdue amount up to the next hearing dates of the application.

Held (allowing the appeal and setting aside the order for sale)

Per Tengku Baharudin Shah JCA delivering the judgment of the court:

(1) The learned judge acted in haste when rejecting encl. 8. He had all the evidence before him to show that the two names referred to the same person. The appellant herself acknowledged that encl. 8 was her affidavit and the loan application was signed by the same person. The respondent's affidavit in fact exhibited all three charge documents in the appellant's name with the same identity card no. 8072178 and address as those of Sivajothy Nagalingam. All those documents in fact bore the same signature of K. Sivajothy, who must be one and the same person. The learned judge had clearly erred and the appellant, therefore, succeeded on this ground. (para 8)

(2) There was, on the facts, a fatal non-compliance with the mandatory requirements of O. 83 r. 3(3)(c) and (6) of the RHC. The amount of interest in arrears was calculated only up to 30 June 1997, and the same date was used for the amount due and owing under the charges, instead of the dates of issue of the originating summons on 2 October 1997 or of the supporting affidavit on 1 October 1997. The supplementary affidavits filed by the respondent thereafter failed to cure the defect of the aforesaid non-compliance. This ground of appeal must, thus, likewise succeed. (paras 9 & 15)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan terhadap keputusan yang arif hakim Mahkamah Tinggi kerana membenarkan permohonan pemegang gadaian responden untuk mendapatkan perintah jualan terhadap tanah perayu di bawah s. 256 Kanun Tanah Negara, untuk mendapatkan kembali sejumlah RM1,204,142.27 yang dikatakan terhutang kepada responden setakat 30 Jun 1997 berkaitan dengan kemudahan-kemudahan pinjaman yang diberikan oleh responden kepada perayu dan kepada sebuah Jothy's Restaurant untuk manfaat perayu. Perayu telah memeterai tiga gadaian

undang-undang atas tanah tersebut sebagai jaminan, masing-masing untuk setiap satu dari tiga kemudahan yang diberi. Dua isu berikut telah dibangkitkan bagi pihak perayu dalam rayuan di sini, iaitu: (i) bahawa yang arif hakim, berdasarkan satu bantahan awal responden, telah menolak afidavit jawapan perayu ('lampiran 8') disebabkan ia tidak diikrarkan oleh perayu tetapi oleh seorang Sivajothy Nagalingam; (ii) bahawa terdapat 'cause to the contrary' dalam ertikata responden telah gagal mematuhi kehendak mandatori A. 83 k. 3(3)(c) Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'). Saman pemula responden telah diisukan pada 2 Oktober 1997 tetapi di dalam afidavit sokongan bertarikh 1 Oktober 1997, faedah yang tertunggak serta jumlah yang terhutang dan kena dibayar di bawah gadain-gadaian tersebut dikira hanya setakat 30 Jun 1997. Afidavit-afidavit tambahan berikutnya hanya mengemaskini jumlah yang terhutang setakat tarikh-tarikh pendengaran permohonan yang akan datang.

Diputuskan (membenarkan rayuan dan mengenepikan perintah jualan)

Oleh Tengku Baharudin Shah HMR menyampaikan penghakiman mahkamah:

(1) Yang arif hakim bertindak secara tergesa-gesa apabila menolak lampiran 8. Beliau mempunyai segala keterangan di hadapannya yang menunjukkan bahawa kedua-dua nama adalah merujuk kepada orang yang sama. Perayu sendiri mengakui bahawa lampiran 8 adalah afidavitnya dan permohonan pinjaman adalah ditandatangani oleh orang yang sama. Afidavit responden malah menunjukkan ketiga-tiga dokumen gadaian adalah atas nama perayu dengan menggunakan no. kad pengenalan 8072178 dan alamat yang sama seperti kad pengenalan dan alamat Sivajothy Nagalingam. Semua dokumen-dokumen tersebut juga membawa tandatangan K. Sivajothy yang sama, yang semestinya merupakan seorang dan orang yang sama. Yang arif hakim jelas khilaf, dan perayu dengan itu berjaya atas alasan ini.

(2) Di atas fakta, terdapat ketidakpatuhan yang fatal terhadap kehendak-kehendak mandatori A. 83 k. 3(3)(c) dan (6) KMT. Jumlah faedah yang tertunggak hanya dikira setakat 30 Jun 1997, dan tarikh yang sama digunakan bagi jumlah yang terhutang dan kena dibayar di bawah gadaian-gadaian, dan bukannya tarikh sama pemula diisukan pada Oktober 1997

atau tarikh afidavit sokongan pada 1 Oktober 1997. Afidavit-afidavit tambahan yang difailkan oleh responden kemudiannya tidak mampu memulihkan kecacatan ketidakpatuhan di atas. Oleh itu, alasan rayuan ini juga harus berjaya.

Case(s) referred to:
Citibank NA v. Ibrahim Othman [1994] 1 MLJ 608 ***(foll)***
Diamond Peak Sdn Bhd v. United Merchant Finance Bhd [2003] 2 CLJ 8 CA ***(foll)***
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(foll)***
Maimunah Megat Montak v. Mayban Finance Bhd [1996] 3 CLJ 9 FC ***(foll)***

Legislation referred to:
Courts of Judicature Act 1964, s. 42(1)
National Land Code, ss. 256(3), 257(1)(c)
Rules of the High Court 1980, O. 41 r. 1(7), O. 83 rr. 1(1)(a), (b), (c), 3(3)(c), (6)

For the appellant - Satvinder Singh; M/s Manjeet & Assoc
For the respondent - Phang Sweet Ping; M/s Albar Zulkifli & Yap

[Appeal from High Court, Kuala Lumpur; Originating Summons No: S2-24-792-1997]

Reported by Suresh Nathan

JUDGMENT

Tengku Baharudin Shah JCA:

[1] This appeal is against the decision of the learned High Court Judge at Kuala Lumpur allowing the respondent chargee's application for an order of sale of the appellant's land under s. 256 of the National Land Code (NLC) to recover the sum of RM1,204,142.27 allegedly due and owing to the respondent as at 30 June 1997 in respect of loan facilities granted by respondent to the appellant and to Jothy's Restaurant for her benefit. 3 legal charges were executed by the appellant over the said land as security, one for each of the 3 facilities.

[2] We did not hear oral arguments of counsel due to constraint of time but by consent of both parties written submissions were submitted to us for consideration and decision.

[3] Only 2 issues are raised on behalf of the appellant in this appeal. They are:

(i) That the learned judge, on the respondent's preliminary objection, rejected the appellant's affidavit in reply, and

(ii) There is cause to the contrary in that the respondent failed to comply with the mandatory requirements of O. 83 r. 3(3)(c) of the Rules of the High Court 1980 (RHC).

Rejection Of Affidavit In Reply

[4] Having given due notice to the appellant of the preliminary objection, the respondent argued that the appellant's affidavit in reply (encl. 8), purportedly an affidavit of the appellant as averred in para. 1 therein, was in fact affirmed not by the appellant but by one Sivajothy a/p Nagalingam. This is said to be a clear breach of the requirement of O. 41 r. 1(7) RHC which reads:

> (7) Every affidavit must be signed by the deponent and the jurat must be completed and signed by the person before whom it is sworn.

[5] The learned judge found the point well taken and rejected encl. 8 holding that there was totally no nexus between the two persons. Even assuming the person affirming was the appellant, nothing was said in encl. 8 to that effect. The learned judge further, in view of such rejection, refused to consider the averments in encl. 8 which the appellant sought to rely on in her subsequent affidavit (encl. 11).

[6] It is submitted on behalf of the appellant that she had in fact acknowledged in encl. 11 that encl. 8 was affirmed by her. It is further submitted that the respondent knew that Sivajothy a/p Nagalingam and Sathunavakey @ Kanagaratnam Sivajothy refer to the same person as the relevant loan application was made in the name of Sivajothy a/p Nagalingam.

[7] Learned counsel further refers to the respondent's first affidavit in reply which at para 7.2.1 states that the appellant Sathunavakey @ Kanagaratnam Sivajothy applied for and signed the loan applications exhibited as 'J10' which application forms were in fact made and signed by Sivajothy d/o Nagalingam. The respondent is alleged to have acted *mala fide* in raising the preliminary objection as they knew very well that the two names refer to the same person.

[8] I have no hesitation in finding that the learned judge acted in haste when rejecting encl. 8. He had all the evidence before him to show that the two names refer to the same person. The appellant herself acknowledged that encl. 8 was her affidavit and the loan application was signed by the same person. The respondent's affidavit in fact exhibited all 3 charge documents J1, 2 and 3 in the appellant's name with the same identity card no. 8072178 and address as those of Sivajothy d/o Nagalingam the applicant in exh. J10. All these documents in fact bear the same signature of K. Sivajothy who must be one and the same person. The learned judge had clearly erred and the appellant therefore succeeds on this ground.

Cause To The Contrary

[9] The appellant's other point is the respondent's alleged failure to comply with O. 83 r. 3(3) of the RHC. The respondent's originating summons was issued on 2 October 1997 but in the supporting affidavit dated 1 October 1997 the overdue interest and the amounts due and owing, in the respective charges were calculated only up to 30 June 1997. The subsequent supplementary affidavits merely updated the overdue amounts up to the next hearing dates of the application. It is submitted, on the authority of *Diamond Peak Sdn Bhd v. United Merchant Finance Bhd* [2003] 2 CLJ 8 CA, that this is a fatal non-compliance with the mandatory requirement of O. 83 r. 3(3)(c) and r. 3(6). The same issue is said to have been similarly decided earlier in *Citibank NA v. Ibrahim bin Othman* [1994] 1 MLJ 608 which decision was endorsed by the Federal Court in *Maimunah bte Megat Montak v. Mayban Finance Bhd* [1996] 3 CLJ 9.

[10] In the oft quoted case of *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36 SC, Gopal Sri Ram JCA listed non-compliance with O. 83 r. 3(3) in the second category of cases where cause to the contrary within s. 256(3) of the NLC may be established. I quote him:

> These are the following categories of cases where cause to the contrary within s. 256(3) of the NLC may be established:
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> (i) Firstly …

A (ii) Secondly, a chargor may show cause to the contrary within s. 256(3) of the Code by demonstrating that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale, … So too when the notice demands sums not lawfully due from the chargee.

B (iii) Thirdly, …

And at p. 51:

A judge hearing an application under s. 256 must bear in mind that the procedure under the section is meant to be speedy and
C summary in nature. Therefore, the trial judge must first be concerned with whether the chargee has given the appropriate statutory notices as stipulated in the Code. **Next, he must ensure that the procedural requirements prescribed by Order 83 of the Rules of the High Court 1980 has been complied with.**
D Next he is concerned with the very narrow question whether the material produced before him by the chargor constitutes 'cause to the contrary'. (emphasis added)

[11] Order 83 r. 3(3) RHC reads as follows:

E (3) where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises and, except where the Court in any cases or class otherwise directs, the state of the account between the chargor and chargee with particulars of:

F (a) The amount of the advance;

(b) The amount of the repayments;

(c) The amount of any interest or installments in arrear at the date of issue of the originating summons and at the date of
G the affidavit; and

(d) The amount remaining due under the charge.

And O. 83 r. 3(6) states:

H (6) When the plaintiff claims payment of money secured by the charge, the affidavit must prove that the money is due and payable and give the particulars mentioned in paragraph (3).

[12] In *Citibank NA v. Ibrahim bin Othman (supra)* it was held
I that on a reading of O. 83 rr. 1(a), (b), (c), 3(3) and 3(6) together, it was incumbent on the plaintiff to provide the statutory particulars in the first affidavit. To quote Shanker J (as he then

was) in that case, "The objective of O. 83 r. 3 is to enable the defendant to know at least by the date the originating summons is filed, what is the exact sum he is legally liable to pay so that he can make up his mind to contest or pay up. If there is a dispute as to the amount payable, the court must be able to say precisely when making the order 'the total amount due to the chargee at the date on which the order is made. These words are from s. 257(1)(c) of the National Land Code 1965 and they are mandatory." The Federal Court approved the ratio in that case in *Maimunah bte Megat Montak (supra)*.

[13] This court when visiting the same issue in *Diamond Peak Sdn Bhd (supra)* held that the respondent is required to satisfy the requirements in para. (3)(c) of O. 83 r. 3 in that the originating summons and the affidavit must state the amount of any interest or instalments in arrears as at the date of the issue of the originating summons and the date of the affidavit. Abdul Kadir Sulaiman JCA (as he then was) in delivering the judgment of that court states:

> The originating summons in this case was issued and the affidavit in support was dated on 20 March 1986 respectively. However, the figures given in the summons and the affidavit relate to the outstanding sum together with overdue interest due and owing by the appellant to the respondent as at 17 January 1986 with further interest to be calculated from 18 January 1986 till date of full payment, and not the position as at 20 March 1986 as so required by paragraph (6) read with paragraph (3)(c) of O. 83 r. 3 of the RHC. … There was, however, a supplementary affidavit affirmed by the general manager of the respondent dated 18 September 1986. But, the position of the outstanding balance of money due and owing by the appellant to the respondent on the said charge given was as at 22 September 1986 which failed to cure the defect in non-compliance with the necessary paragraphs earlier mentioned.

[14] The respondent in that case was held to have clearly failed to comply with the mandatory requirements of O. 83 r. 3(3)(c) and 3(6) RHC which constituted an additional ground for allowing the chargor's appeal.

[15] The situation is no different in the present case. The amounts of interest in arrears are calculated only up to 30 June 1997, and the same date is used for the amounts due and owing under the charges, instead of the dates of issue of the originating

A summons on 2 October 1997 or of the supporting affidavit on 1 October 1997. The supplementary affidavits filed by the respondent thereafter, as in the cases cited, fail to cure the defect in the aforesaid non-compliance. This ground of appeal must therefore likewise succeed.

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[16] For the aforesaid reasons, I would allow the appellant's appeal with costs and set aside the order of sale made by the learned trial judge. Deposit is refunded to the appellant.

C **[17]** This appeal was heard by a panel of three judges of this court when we reserved judgment. Our learned brother, Abdul Kadir Sulaiman, JCA the Chairman of the court, had since retired leaving the two of us to determine the appeal by virtue of s. 42(1) of the Courts of Judicature Act 1964. My learned brother Azmel Haji Maamor, JCA had read this judgment in draft and registered his agreement. Order accordingly.

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